

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Southern Division.

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In the Superior Court of the State of Washington
in and for Franklin County.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Complaint.

Plaintiff complains and alleges:

1.

That at all times herein mentioned, the defendant was, and now is a public service corporation, doing an interstate business as such. That during the month of October, 1908, the plaintiff was employed by the said defendant, and at all times herein mentioned continued in such employ.

2.

That when the plaintiff entered the employ of the defendant and at all times herein mentioned, the defendant agreed for a valuable consideration, to wit: a certain monthly fee deducted from the wages of the plaintiff to provide the plaintiff with medical, surgical and hospital attention, at such times and in such amounts as the plaintiff should require, either by reason of injury or sickness. That the amount stipulated was deducted monthly by the defendant from the wages due the plaintiff during the entire period of the employment aforesaid. That for the purpose of carrying out this transaction, the de-

fendant employed physicians and surgeons along its line, and organized and maintained a hospital at Tacoma, Washington, and employed therein physicians, surgeons and attendants.

That in January, 1913, the plaintiff became sick with appendicitis, and pursuant to said arrangement, the said plaintiff was taken to the hospital of the defendant at Tacoma, Washington, there to be operated upon, or to be treated for appendicitis. That upon arriving at the hospital at Tacoma as aforesaid, the plaintiff was operated upon by one of the physicians and surgeons therein employed, to wit: Dr. S. W. Mowers, and was then provided with nurses and attendants by the defendants as aforesaid. That the defendant was negligent in the treatment and care of this plaintiff, as follows:

First. The surgeon operating upon the plaintiff failed to remove all of the infected portion of the appendix, allowing a portion of such appendix to remain.

Second.—In making the incision for the purpose of removing the appendix, the surgeon made an incision larger and longer than ordinary, and failed to properly close the incision by bringing the various layers of the abdominal wall together, and placing sufficient sutures at proper intervals to hold the closure of said abdominal wall.

Third.—That owing to the condition in which the plaintiff was left after the operation, it was necessary and proper that he be bandaged so as to immobilize the parts to prevent the development of a hernia. That one of the attendants furnished by

the defendant, to wit: Eisengraver, was negligent in that he untimely removed the bandage aforementioned with the natural and expected result that hernia developed, through such untimely and negligent removal.

3.

That thereafter, the surgeons in the hospital aforesaid instructed the return of the bandage with proper dressing for attention. That thereafter, the attendants furnished by the defendant failed and refused to properly dress the said wound once for a period of three to four days, and once for a period of five days, with the result that serious infection occurred.

4.

That by reason of the careless and negligent manner in which the plaintiff was treated, the wound as aforesaid failed to heal, and the servants and agents of the defendant failed and refused to remove the remnant of the appendix and failed and refused to operate for the hernia caused by the neglect as aforesaid, although the plaintiff continued under the care and treatment according to the previous agreement and understanding up to the year 1919, and up to which time the defendant's neglect continued. That the defendant, through its officers, agents and employees failed and refused to advise the plaintiff as to the true condition, but at all times assured him that he was receiving proper treatment and would get well, and in the year 1917, instructed him to report for examination as to his ability to work. That his condition, due as aforesaid con-

tinued to get worse, and on the 4th day of March, 1918, the plaintiff submitted to an operation, for the removal of the residue of the appendix, which was in part the cause of the plaintiff's condition and for a correction of the other negligent treatment hereinbefore complained of.

5.

That at the time of the negligent operation, and the negligent treatment complained of by the plaintiff, he was about thirty-six years of age, mentally and physically well, and in good condition, and able to earn upwards of \$300.00 per month. That by reason of the negligence complained of, the plaintiff has been caused continuous and extreme suffering and pain, and complete loss of health, and has been permanently disabled in his earning capacity, and has suffered damages in the sum of \$75,000, all through the acts of the defendant, its officers, agents and agencies.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$75,000, together with his costs and disbursements herein, and such other relief as may be just and proper.

CHAS. W. JOHNSON,

Attorney for Plaintiff.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the defendant, and for its answer to
the complaint of the plaintiff states:

I.

Admits Paragraph 1 of plaintiff's complaint to be
true.

II.

Answering Paragraph 2 of plaintiff's complaint
defendant denies each and every matter and thing
therein stated, whether as therein alleged or other-
wise.

III.

Answering Paragraph 3 of said complaint de-
fendant denies each and every matter and thing
therein stated, whatever as therein alleged or other-
wise.

IV.

Answering Paragraph 4 of said complaint de-
fendant denies each and every matter and thing
therein stated, whether as therein alleged or other-
wise.

V.

Answering Paragraph 5 of said complaint defendant denies each and every matter and thing therein stated, whether as therein alleged or otherwise.

For a first affirmative answer and defense to plaintiff's alleged cause of action, defendant states:

1.

That heretofore, and prior to October, 1908, a certain association of railway employees organized themselves together for their mutual benefit and advantage in an association known as the Northern Pacific Beneficial Association, and said association since prior to 1918 has operated a line of hospitals in the different states through which the Northern Pacific Railway operates and employed and still employs physicians and surgeons, nurses and hospital attendants as such hospitals and also at and in the towns through which said railway company operates a line of railway. For the purpose of furnishing funds with which to operate said hospitals and pay such physicians, surgeons and other employees, it was agreed and ever since has been agreed by the railway employees of said Northern Pacific Company that a certain small sum of money shall each month be deducted from the salaries of its employees by the railway company and by it turned over to said Northern Pacific Beneficial Association, and said railway company has during all of said time so done. The amount paid by each employee depends upon the salary which he earns and defendant states that it has never in any man-

ner engaged in the maintenance of said hospitals or the employment of physicians or surgeons or made any profit whatever out of the same, but that said association is managed and controlled by railway employees for their own benefit.

That defendant is informed and believes that the surgeons whom it is alleged provided plaintiff with medical and surgical and hospital attention were the doctors, nurses and attendants employed by said association, and defendant alleges that this defendant had nothing to do with the employment thereof nor with their compensation.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Reply.

Comes now, the plaintiff in the above-entitled cause, and for reply to the affirmative answer and defense contained in the defendant's answer, the said plaintiff denies each and every material allegation contained therein.

WHEREFORE, plaintiff demands judgment as prayed for in his complaint.

CHAS. W. JOHNSON,
Attorney for Plaintiff.

Court's Instructions for Verdict.

Mr. JOHNSON: We rest.

E. J. Cannon for defendant moves for directed verdict.

Argument by counsel for Plaintiff and authorities cited.

The Court instructs jury to return verdict in favor of defendant, Northern Pacific Railway Company.

Verdict returned as instructed.

Exception by Plaintiff.

Chas. W. Johnson for plaintiff asked permission to present matters to perfect Writ of Error in Spokane. Permission granted.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

No. 879.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

M. L. McMURTREY,

Foreman.

Filed June 8, 1920. W. H. Hare, Clerk.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation.

Judgment.

The above-entitled action having been duly called for trial and a hearing before a jury on the 7th day of June, 1920, in the United States Court Room in the city of Walla Walla, Southern Division of said District Court, and a jury having been duly called, the plaintiff being represented by Charles W. Johnson, his attorney, and the defendant by Edward J. Cannon, its attorney, and the court having duly heard the testimony of the plaintiff and his witnesses and the defendant's witnesses, and a motion having been made at the close of the testimony that the Court direct a verdict in favor of the defendant, which motion was argued and taken under advisement by

the court, and after having been duly considered said motion was granted, to which ruling of the Court plaintiff excepted, which exception was allowed, and said jury thereupon by instructions of the Court having brought in a verdict in favor of the defendant.

NOW IT IS ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by this action and that a judgment be entered therein in favor of the defendant with its costs.

Dated June 21, 1920.

FRANK H. RUDKIN,
Judge.

Filed June 22d, 1920. W. H. Hare, Clerk. By E. E. Wright, Dep.

Testimony of James E. Carr, for Plaintiff.

JAMES E. CARR, called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. JOHNSON.

Q. Mr. Carr, you are the plaintiff in this case?

A. Yes, sir.

Q. Where do you live?

A. Pasco, Washington.

Q. How long have you lived in Pasco?

A. I have lived there seven years.

Q. And were you ever in the employ of the Northern Pacific Railway Company? A. Yes, sir.

Q. When did you first enter into the employ of the Northern Pacific?

(Testimony of James E. Carr.)

A. October, 1908.

Mr. JOHNSON.—Q. Have you ever been discharged? A. No, sir.

Q. Have you ever resigned from their employ?

A. No, sir.

Mr. JOHNSON.—Q. By whom were you employed when you went to work for the Northern Pacific? A. The Trainmaster at Pasco.

Q. Who was the Trainmaster?

A. James Shannon.

Q. Did you make application for employment with the Northern Pacific at that time?

A. Yes, sir.

Q. Was there anything contained in the application with reference to your receiving such—

Mr. CANNON.—(interrupting) The application would be the best evidence of it.

The COURT.—The application was in writing, was it, Mr. Carr? A. Yes, sir.

Defendant's Exhibit "A."

4-07 25M 8

Form 515

NORTHERN PACIFIC.

Deft. Ex. "A" Admitted.

Application for Employment as Trainman.

The Superintendent will require all persons, before entering the service of this Company, to answer the following interrogatories in their own handwriting. Blanks must be filled up and signed in triplicate, two copies being forwarded to Superintendent with any letters of recommendation which

applicant may have, of which a record will be made and all letters other than those of Northern Pacific issued returned. Letters of recommendation or clearances issued by the Northern Pacific Railway Company, may be held by the Superintendent who will, if requested to do so, make notation of all previous service on the clearance which is issued from his office. The applicant will keep the third copy of this personal record for future reference. Superintendents will forward to General Claim Agent, St. Paul, one of the copies sent them.

1. Name in full—James E. Carr.
2. Birthplace—Winona. State—Minnesota.
3. Age—32 years last birthday.
4. Nationality—Irish.
5. Married or single—married.
6. If married, where does your family reside?—
No. 608. St.—Avon. Town or City—La-
crosse. State—Wisconsin.
7. If single, where does your family or nearest
relative reside, and what is his (or her) name?
..... No..... St.....
Town or City..... State.....
8. How many years experience in Railroad ser-
vice?—9½.
9. Ever injured; if so, on what road and to what
extent?—No.
10. In what business before entering Railroad busi-
ness?—Steamfitting and Plumbing. At what
place?—Winona. State—Minnesota.
11. Name ALL Roads on which you have been em-
ployed:

Railroad.	Name of Superintendent.	Address.	In What Capacity.	In What Year.
C M & St P	B F Van Vleit	Minneapolis	Bkm Switchm & Condr	1899— 1908

12. If you have been employed before on any Division of this Road, or Branches, state which one, when, and in what capacity?—No.
13. On what road last employed?—C. M. & St. P. River Division. Cause of leaving?—Resigned.
14. Number of letters of recommendation enclosed—None.
15. How have you been occupied since your last employment terminated?—No.
16. Have you read, and do you understand the following Rule of the Northern Pacific Railway Company?—Yes.
18. Do you agree to comply with all the requirements of the foregoing rule in case you enter into the Company's employ?—Yes.
19. You are notified that if you, or any other employe, chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific Railway Company, you do so solely at your own risk. The Company expects you and all other employes to comply strictly with all of its rules and regulations, and does not, and will not, in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the Rules of the Company by you or any other employe of the Company, whether habitual or otherwise, are not consented to or acquiesced in by the Company?—Yes.

20. Do you know that by a rule of said Railway Company its employes in all Departments are required to give the Company ten (10) days notice of their intention to quit the service, such notice to be given to the Superintendent or General Foreman of their Department, and do you assent to such rule in entering the employment of said Company?—Yes.
21. Do you understand that you are required to become a member of the Northern Pacific Beneficial Association upon entering the service of the Northern Pacific Railway, and do you assent to that Association's rules and monthly deductions from your salary for this purpose?—Yes.
22. Are you related to any officer or employe of this Company? If so, state to whom and how related.

This application made by James Edward Carr.

(Sign your name in full, no initials.)

Located at Pasco, Washington

Date—10-26, 1908.

Witness: Jas. Shannon.

No.———

NORTHERN PACIFIC.

Personal Record.

Name—J. E. Carr.

Occupation—Brakeman.

Date of Application—10/26, 1908.

Date Employed—.....190..

Division—Pasco.

 Above to be filled by Division Superintendent.

(Testimony of James E. Carr.)

Description of Person Named Within.

1. Height—5 ft. 11 in.
2. Form—Tall.
3. Weight—180.
4. Complexion—Light.
5. Color of Hair—Black.
6. Color of Eyes—Blue.
7. If beard is worn what color, and in what manner—None.

 Above to be filled by Applicant.

Certified to as correct

.....Employer.

Duplicate forwarded to Gen. Claim Agent.

.....190..

.....Supt.

Mr. JOHNSON.—Q. After you went to work for the Northern Pacific in 1908 was anything paid by you to the Northern Pacific for medical aid and attention and surgical attention?

A. It was taken out of my salary.

A. Why, I applied when I went to the hospital.

Q. Now then, when was that?

A. That was in 1913.

Q. To whom did you make application?

A. I called the doctor in.

Q. What doctor did you call in?

A. Dr. H. M. Johnson at Toppenish.

Q. What condition were you in physically when you called Dr. Johnson? A. I was sick.

Q. Who was Dr. Johnson at Toppenish?

A. Northern Pacific doctor at Toppenish.

(Testimony of James E. Carr.)

Q. What did he do with you then?

A. Well, he fixed me up and sent me over to Tacoma.

Q. Where did he send you in Tacoma?

A. To the Northern Pacific Hospital.

Q. Did you receive treatment in the Northern Pacific Hospital in Tacoma?

A. Yes, sir.

Mr. JOHNSON.—Q. When you were taken to the hospital at Tacoma from whom did you receive your first attention there?

A. Well, I don't know who it was examined me that evening.

Q. Did any of the surgeons of the hospital examine you the next day? A. No.

Q. What treatment did you receive at the hospital?

A. Prepared for an operation that night, to be operated on in the morning.

Q. Do you know who operated upon you?

A. Dr. Mowers told me he did.

Q. Who was Dr. Mowers?

A. He was the Chief Surgeon at Tacoma.

Q. Did Dr. Mowers tell you what your ailment was, or what you were suffering from or what he operated for?

A. Not right at the time; he told me in the morning.

Q. What did he say was your ailment?

A. He says appendicitis; remove the perforated appendix.

Q. Tell the jury as near as you can, what condition

(Testimony of James E. Carr.)

you found yourself in after the operation, that is, with regard to your bandages or the care that you had received immediately after the operation.

A. Well, after the operation—they made two incisions on the table, on the operating table; one was about three inches long, and then there was a smaller one lower down with. And the one above was sewed up on the table, closed and held together with tape, and they used the lower one for a drain.

Q. And the upper one was bandaged with tape?

A. That was with tape.

Q. How long was that bandage allowed to remain?

A. Well, on the incision that was sewed up?

Q. Yes.

A. That was on there from the end of January to the 1st of February.

Q. About how many days, would you say?

A. Oh, I should judge close on to three weeks.

Q. Was there any other sort of bandage aside from the adhesive tape?

A. There was a little piece of dressing just soaked in there underneath the tape to kind of soften it up a little where the incision was made.

Q. You say that bandage or dressing was removed in about three weeks after the operation. Who removed that bandage?

A. Why, they changed internes the first of the month, and a new interne came in and removed it, took the tape off.

Q. Was the surgeon present when the tape was removed? A. Only this interne.

(Testimony of James E. Carr.)

Q. Just the interne? A. The interne.

Q. Do you remember his name?

A. Eisengraver.

Q. What did he do after he removed the bandage, if anything?

A. Why, I asked him to leave them on and he told me it wasn't necessary.

Q. What followed after he removed the tape?

A. Well that night, why, I rolled around there and the side busted open.

Q. The stitches let go? A. Let go.

Q. What was the condition of your side the next morning?

A. It was blood; the dressing was saturated with blood, and clothes.

Q. Did the Chief Surgeon or his assistant come in and see you?

A. The assistant surgeon came in in the morning making his rounds.

Q. What was his name? A. Dr. Argue.

Q. Did he examine you then?

A. I called his attention to it and he looked at it, that is, he didn't look at the wound; just turned the clothes over; he didn't look at it at the time.

Q. He didn't look at it at the time?

A. No, just looked at the dressing.

Q. Did you complain to him about your condition?

A. I told him it was tore loose and he says I must be mistaken, and I says, "No, I don't believe I am, I think she let go last night, I am all saturated." "Oh," he says, "I guess you are mistaken." I says,

(Testimony of James E. Carr.)

“No, I ain’t, look,” and I turned the bed clothes back, and he could see the blood and he left there.

Q. What followed after that?

A. He and the interne Eisengraver came back in.

Mr. CANNON.—If we knew about how long that was after the operation it might help out.

Mr. JOHNSON.—He said about three weeks.

Q. What happened when he and the interne, Dr. Eisengraver, came back in?

A. Well, Dr. Eisengraver started to dress it and Dr. Argue stood at the foot of the bed, and Dr. Eisengraver was dressing the side and Argue stood back and he saw the condition I was in, and he kind of shook his head, he didn’t say nothing at the time. So finally Eisengraver was just about getting through when Argue spoke to him and says, “Better put them straps back on there; they ought to leave them on.” So he put the dressing on and Argue walked out.

Q. You refer to the tape that had been on there prior to that time? A. Prior to that time, yes.

Q. Was the tape put back on?

A. There was tape put back on, but there was dressing underneath.

Q. Different from what it had been originally?

A. Different from what had been in there.

Q. What, if anything more was said by either of the doctors there at that time?

A. Well, Dr. Eisengraver says, “You hadn’t ought to complain like that on me,” or words to that effect. “Well,” I says, “I had to do something.”

(Testimony of James E. Carr.)

Q. What did he say?

A. Why, he said that I hadn't ought to have called Dr. Argue's attention to it. I told him, "I think I ought to talk to somebody," I says.

Q. Then who of the attendants or surgeons there next saw you in connection with this wound?

A. Why, nobody, only this interne kept right on dressing me.

Q. Tell the jury and the Court in your own language, Mr. Carr, just what followed after the rupture that you have mentioned here in connection with the wound that had been left.

A. Well, this interne, he took care of my side there, I think for about a week, changing the dressings and stuff like that. So then one day he didn't show up at all, or the next day he didn't show up. So the third morning Dr. Argue came in the room, and I asked him how often my side needed attention, and he says, "Why, about once in twenty-four hours." "Well," I says, "this is pretty near three days now, and I haven't had no dressing or attention on it." "Well," he says, "maybe it don't need it." I says, "You better look and see whether it does or not," and I turned back the bed-clothes and Argue started right out the door then, and in come the interne with some dressing under his arm. He had his street clothes on, and he come in there complaining, "You are kicking all the time; you are kicking all the time."

Q. Did Argue see the condition of your side before he went out?

(Testimony of James E. Carr.)

A. He just saw the outside of the dressing and it was all saturated.

Q. And then the interne Eisengraver came back in, and what did he do?

A. He started to dress it, and he said I was complaining and kicking all the time. I asked him if he thought I was wrong in calling Dr. Argue's attention to this. I says, "I got to get some attention,—"

Mr. CANNON.—(Interrupting.) I don't see what difference it makes about their talks.

Mr. JOHNSON.—It is part of the conversation, and it is much easier for a witness to relate what was said and done.

The COURT.—Yes; just proceed.

Mr. JOHNSON.—Q. Go ahead, Mr. Carr.

A. He says, "No use kicking like that all the time; that won't get you nothing." "Well," I says, "I have got to have some attention." So he dressed it that day. He wouldn't answer me the first time—when he said I was kicking all the time I asked him—that was the second time—he says, "Maybe a little clean dressing wouldn't hurt it." So he fixed my side up and the next morning he never showed up at all, nor the next morning he didn't show up. The third morning he didn't show up, and I got some dressing from the nurse to put in in there, and I just tucked that underneath to soak up the stuff and pus; everything was running then, but I thought "What is the use of kicking; I am getting in awful bad"? and I wouldn't say

(Testimony of James E. Carr.)

nothing. So the next morning there was a fireman in there that was going into the dressing-room on a wheel-chair to get his attention in the dressing-room, so I asked him when he came back from there, I says, "Did that doctor in there say anything about fixing me up?" He says, "Yes, he spoke about you; he has got you to take care of yet."

Mr. CANNON.—Just a minute—

The COURT.—(Interrupting.) Sustain the objection.

Mr. JOHNSON.—Q. Tell what took place, not what any one not connected with the institution said. Tell what took place, what you did and what the attendants at the institution did.

A. Well, they didn't do nothing that day. That was the fourth day. And that afternoon I got into the wheel-chair that this foreman had, and I went looking for Dr. Mowers. I went down in the elevator from the third floor to the first floor and inquired from the girl in the office or lobby where Dr. Mowers was, and she said she thought he was around the building. I says, "Where is Dr. Argue?" She says, "He has gone down town." So I went around the building looking for Dr. Mowers. I didn't find him. I was in this wheel-chair all the time, wheeling myself around. So I came back to the office, and I says, "Where is Dr. Mowers, I can't find him?" She says, "Maybe he went down town." I came out in the corridor and I met Dr. Bell, and I asked him if he knew where the doctors was, and he says, "They both went down town."

(Testimony of James E. Carr.)

So I went back to my room. I saw there was no chance, so I went back to my room. The next morning Dr. Mowers come in and I asked him if he understood my condition. He says, "Yes." I says, "You mean to say, you understand my condition? I need some attention. I went three days once without any dressing, and it is the fifth morning now the second time." I says, "I am laying there rotting, and I have got to have a doctor." He says, "Do you want me, or Dr. Argue?" I says, "Either one suits me, as long as it is a doctor; I got to have some attention." So he says, "All right, I will look at your side myself this morning after I make my rounds." So I was still in the wheel-chair and I wheeled out in the corridor and I met this Dr. Eisen-graver, and he says to me, "Carr, as long as you are up come on in the dressing-room and I will fix your side in there." And I wheeled the chair into the dressing-room myself, and he says, "Can you get up on the table?" I says, "No, I ain't going to try to get on the table." So he says, "What did you come in here for," and started getting mad. He says, "I will tell you what I think of you; you questioned my ability as a doctor." I says, "No, I never did; you are mistaken." He says, "Yes, you did." I says, "No, I didn't; you haven't given me the opportunity yet." He says, "What do you mean?" I says, "You ain't a doctor." So I went out of the room, and he went out of the room, and I met Dr. Mowers a short time afterwards and he come up to me laughing, and he says, "What is the matter with

(Testimony of James E. Carr.)

you and Dr. Eisengraver?" I says, "Nothing, why?" "Oh," he says, "he just told me you stepped on his toes." I says, "That is as far as I could get in the condition I am now." He says, "Come on in the dressing-room, and I will fix you up." We went in the dressing-room and he put me on the table and started fixing up my side, and dressed there and cleaned it off and put me back to bed. But the side never seemed to get well after that, at all. Dr. Argue took care of me every day after that.

Q. Well, about twenty-one days elapsed before the bandage was removed and the wound ruptured, and then three days more before it was dressed the first time, and five days before it was dressed the second time?

A. The fifth day would be the second time.

Q. And then Dr. Mowers dressed it himself?

A. Dr. Mowers dressed it himself.

Q. Did Dr. Mowers say anything about the condition of your side at the time he dressed it?

A. No, never said a word about the side.

Q. How long did you remain at the hospital after that?

A. I remained up there close on to—I don't know just—close on to three months.

Q. What was the condition of the wound?

A. Oh, it kept discharging all the time—pus.

Q. Was it discharging pus when you left there?

A. Yes, sir.

Q. Did they discharge you from the hospital at the time you left there?

(Testimony of James E. Carr.)

A. They said I could go home; they thought maybe a change would do me good.

Q. Just tell us what happened after you went home. Did you go back to work?

A. No. I called in Dr. Johnson to take care of it then. He changed the dressing every day. Sometimes I would be able to go down to the office and sometimes he would come up, and he would take care of it. Finally, he says to me, "You better go back to the hospital and get that cleared up; that ain't going to heal on you." I says, "They seem to think it is over there." He says, "It ain't going to heal up; you better go back to the hospital and see what they think of it." So I went back to the hospital, and I spoke to Dr. Mowers about it—

Mr. CANNON.—(Interrupting.) When did you go back?

A. Oh, it was about a month afterward; I wouldn't say the exact dates or anything like that. I went back to the hospital and told Dr. Mowers that Johnson says somebody ought to go in there and clear that up, and he says, "That will come out all right, Carr, don't worry about it." So I stayed around the hospital a short time, and I wasn't no better or worse and I went back to Toppenish again, and Johnson, he started taking care of it again. He says, "What do you come back here all the time for? Why don't you make them fellows go in there and clear that up?" I says, "They seem to think it isn't necessary, it is going to heal itself." Johnson says, "You go back and tell them

(Testimony of James E. Carr.)

they got to go in there.” So I went back and I met Mowers and told him what Johnson says. “Oh,” he says, “Now, Carr, that will heal up.” I was only there at the hospital about a day that time, and I came back to Johnson, and it went along the same all the time after that.

Mr. JOHNSON.—Q. You lived in Toppenish at that time?

A. At the time. I asked Dr. Mowers if it would be all right for me to go to work, and he says Yes. So I went back to Toppenish and tried to go to work.

Q. Did you work then?

A. I made one trip from Toppenish to Ellensburg on a passenger train as flagman, and returned to Toppenish.

Q. What was your physical condition when you returned to Toppenish?

A. When I returned to Toppenish my side was running something fierce; it was all saturated; I just couldn't move.

Q. What time of the year was it, if you can remember?

A. Oh, I should judge, around in August; in the summer sometime.

Q. Then, how long did you stay in Toppenish?

A. I stayed in there until September.

Q. Of that year? A. Of that year.

Q. Where did you go from Toppenish?

A. To Pasco.

Q. Did you receive any treatment there from any company doctors?

(Testimony of James E. Carr.)

A. Yes, sir; Dr. O'Brien and Dr. Driscoll.

Q. Who were they?

A. They were company doctors at Pasco.

Q. What treatment did you get from them, if anything?

A. Oh, just about change the dressing is all and keeping the wound clean.

Q. Did you see Mowers at any time after that?

A. Why, I met him one day; he got off the train there at Pasco, and I asked him if he was going down town. He says, "Yes, I am going down to O'Brien's office." I says, "I want you to look at my side while you are down there." He says, "All right, I will take a look at it for you." So I went down to O'Brien's office and Mowers was there, and they examined me, and I says, "Why don't you go in there and fix that up?" "Oh," he says, "Carr, that will heal that quick," and he snapped his finger, "no use operating on that." I says, "That is an awful shape to be in if you can stop it." "Oh," he says, "that is going to heal, no use worrying your head about it."

Q. When was that conversation?

A. I should judge the latter part of 1913 or the fore part of 1914.

Q. Probably a year or so after the operation?

A. A year or so after the operation.

Q. How long did Drs. O'Brien and Driscoll continue to treat you then in Pasco?

A. Oh, they have treated me off and on until 1919; well, practically, O'Brien has been treating me since.

(Testimony of James E. Carr.)

Q. Did you ever consult any one else about the condition of your side?

A. I went to the Drs. Mayo, at Rochester.

Q. Who was with you when you consulted Drs. Mayo? A. Nobody the first time.

Q. What was said or done at the Mayo Hospital regarding this side of yours?

A. Why, they said they could fix it up with a little operation; says, "It has got to be cleared up."

Q. What year was that, do you remember?

A. That was in 1914.

Q. Did they fix it up?

A. Well, they examined me and got me all ready for the hospital, to be fixed up, and I caught a cold just as I was getting admitted to the hospital for an operation, and they told me they wouldn't operate on me until I got over this cough.

Q. What did you do then?

A. I returned to Pasco. I says, "No use being under this expense here, I may as well go home to Pasco and I will come back when I get rid of this cough."

Q. Did you consult Drs. Driscoll and O'Brien when you came back to Pasco? A. I did.

Q. Did you ever make any other visits to Rochester? A. I did, later on that year.

Q. What year was that?

A. Well, now, let's see: Well, it was that year or the next year, in the spring, something like 1915.

Q. And did you consult the Mayos at that time?

A. I did; yes.

(Testimony of James E. Carr.)

Q. Who was with you, if anyone, at that time?

A. Why, nobody was there, with me then.

Q. Did they operate at that time?

A. No, sir.

Q. What was said or done at that time?

A. They said it was turning into "TB," that I had to forget about the side for a while; "TB" of the lungs, the right and left lobe.

Q. And on account of that, they were unable to operate?

A. On account of that they says there would be no use to be operated on in this condition.

Q. What did you do then?

A. Well, prior to that, I went over to the N. P. hospital, before that.

Q. Before that; what year was that?

A. That was in 1914, before I made the second trip to the Mayos.

Q. What was said or done in the hospital at that time?

A. I went over there, and they diagnosed catarrhal bronchitis and cough and hay fever; they called it catarrhal bronchitis.

Q. They said you were affected with catarrhal bronchitis at that time? A. Catarrhal bronchitis.

Q. What else was said or done there?

A. Well, they was treating me for catarrhal bronchitis. Dr. Mowers came in one day, and he says, "You back again?" I says, "Yes." He says, "How is that side of yours?" I says, "The same as you left it." He says, "I will take a look at

(Testimony of James E. Carr.)

that this morning." He says, "Will you come down to my private office?" I says, "Yes, what time?" He says, "Nine o'clock." I went down to his private office, and I got up on the dressing-table, and Dr. Argue and Dr. Drough was in there, and Mowers looked at my side. He says, "I will fix that up for you in the morning." I says, "What's the idea? You understand what I am over here for, don't you? I got an awful bad cough." I had wrote to the Mayos in the meantime, and asked them if they had any objections to my going over to the N. P. to be operated on after I had been to them, and they told me "No, you can go over there if you want to." So Mower told me, "I will fix that side up for you in the morning." I says, "What's the idea 'in the morning'? I just come from Rochester and they told me they wouldn't operate on me on account of the cough." He says, "That's funny." I says, "Yes; what's the matter with letting me stay around two or three weeks and cure up this cough, and then if you want to operate go to it?" I says, "What do you want to operate to-morrow for?" He says, "Well, I am going away to-morrow." I says, "Where are you going?" He says, "I am going to Hayden Lake." "Well," I says, "I believe I will try and get rid of this cough before I let anybody operate on me; in fact I want the fellow that operates on me to stay on the job until I am well." "Well," he says, "That's all I can do for you." He says, "That is disgusting." That is the words he says. I says, "Yes, I understand it is,"

(Testimony of James E. Carr.)

I says, "it is worse than that." So he left the room and Argue fixed up my side and put the dressing on.

Q. Did you offer to stay there until you got over this cough? A. I offered to stay there.

Q. Just what language did Mowers use, if anything, when he left the room?

A. Well, he just said it was disgusting and left the room.

Q. Did he say anything about a further operation?

A. No, he didn't say anything about a further operation at the time.

Q. How long did you stay there at the hospital at that time?

A. Oh, I think I left the next day or two after something like that.

Q. Where did you go?

A. I went back to Pasco.

Q. Who treated you when you got back to Pasco?

A. I went to Drs. O'Brien and Driscoll.

Q. Now, then, you went to the Mayo Hospital in—

A. (Interrupting.) That is when I went to the Mayo Hospital and they diagnosed my case "TB," right and left lobes, they said.

Q. Do you remember what year that was?

A. It was 1915.

Q. Tell us what further treatment you received.

A. Well, they examined me there and told me I had to take a rest-cure, or something like that, and build up. They come right out flat-footed and told me it was "TB" and I had to take care of myself.

(Testimony of James E. Carr.)

So I built myself up for about a year or year and a half.

Q. You came back from Rochester to Pasco?

A. I came back from Rochester. I gained about thirty or thirty-five pounds.

Q. Who was treating you when you came back from Rochester the second time?

A. Dr. O'Brien.

Q. Did you make any other visit to Rochester?

A. Yes, sir, later on.

Q. In what year? A. 1918.

Q. Now, then, between 1918 and the last visit to the Mayos' hospital, did any other surgeon of the company examine you?

A. No, sir; aside of Dr. O'Brien; he was the company surgeon.

Q. And did you receive treatment from any one during that period of time excepting the company doctor there at Pasco? A. No, just Dr. O'Brien.

Q. Did you ever report for duty during any of this period? A. Yes, sir.

Q. When was that?

A. Oh, I have worked periodically off and on there whenever I would feel like it. I would make a trip and back, and I reported for duty and worked there, and I also reported once for some light work, but the superintendent didn't see fit to give it to me and we had some talk about that, and he says, "I can force you to take a medical examination."

Q. When was that, Mr. Carr?

Mr. CANNON.—I don't think it is material.

(Testimony of James E. Carr.)

Mr. JOHNSON.—It is preliminary to an examination that was actually made.

The COURT.—Well, get to the examination, then. The preliminary conversation has nothing to do with it.

A. He gave me an order and I went down to Dr. Hambly and he passed me to go to work.

Q. What year was that? A. 1915.

The COURT.—It seems to me if we wouldn't jump from one date to another we could get through quicker.

WITNESS.—I wouldn't say for sure; I don't know just exactly to that date.

Mr. JOHNSON.—Q. Was it after the second trip to Rochester?

A. It was after the second trip to Rochester. It was 1916, I can remember positive of that now.

Q. Who was Dr. Hambly that you reported to for examination?

A. He was the Northern Pacific doctor at Pasco.

Q. Did you go to work after that? A. Yes, sir.

Q. How long did you work?

A. Oh, I may have worked about two months, I believe; I don't know. I didn't work two months steady, but I worked off and on maybe six months. When I was able to make a trip I would go.

Q. That was in 1916? A. That was in 1916.

Q. Did you then return to the Mayo hospital for further treatment?

A. Yes, I went in March, 1918.

Q. What took place there?

(Testimony of James E. Carr.)

A. They decided to operate.

Q. Did they operate? A. They operated.

Q. What happened after that, where did you go?

A. Oh, I stayed around there two or three months, and I came back home and still been doctoring.

Q. You came back home? A. Yes.

Q. Who accompanied you back to Rochester in 1918, if anybody? A. Dr. H. B. O'Brien.

Q. Who sent him back there with you?

A. Why, I requested him.

Q. Who did you make the request to?

A. To him.

Q. Did Mowers or any of the surgeons of the Northern Pacific at any time operate on you the second time? A. No.

Q. What is the condition of your side at this time? A. It is discharging pus.

Q. Still discharging pus. What was your condition of health prior to this operation in 1913?

A. Considered pretty good—good.

Q. Had you been examined prior to that time by any of the surgeons of the company?

A. Before that?

Q. Yes. A. Yes, sir.

Q. Who?

A. Dr. H. M. Johnson, Toppenish.

Q. I show you Plaintiff's Exhibit 1, and ask you when that photograph was taken.

A. Taken at La Crosse, Wisconsin.

Q. When was that taken?

A. The summer of 1912.

(Testimony of James E. Carr.)

Q. The summer previous to this operation?

A. Previous to this operation.

Q. And who is that a picture of?

A. Myself, my wife and her sister.

Mr. JOHNSON.—We offer Plaintiff's Exhibit 1.

Mr. CANNON.—Objected to as immaterial.

Mr. JOHNSON.—For the purpose of showing his physical condition and appearance prior to the operation.

The COURT.—It will be admitted for what it is worth.

Whereupon, said picture, marked for Identification Plaintiff's Exhibit 1 was admitted in evidence, and is hereto attached and made a part hereof.

Mr. JOHNSON.—Q. I show you Plaintiff's Exhibit 2 and ask you where that photograph was taken.

A. Taken in Pasco, Washington.

Q. About when was that taken? A. 1915.

Q. Who is that a picture of?

A. Picture of myself, Kick, and I don't know the other party's name.

Mr. JOHNSON.—We offer Plaintiff's Exhibit 2 for the same purpose.

Whereupon, said photograph, marked for Identification Plaintiff's Exhibit 2, was admitted in evidence, and is hereto attached and made a part hereof.

Mr. JOHNSON.—Q. The one with the cross immediately over the head is your picture?

A. That is my picture.

(Testimony of James E. Carr.)

Q. I show you now Plaintiff's Exhibit 3 for Identification and ask you whose signature appears in that examination. A. It is my signature.

Q. Who made that out?

A. Dr. H. M. Johnson.

Q. Whose signature is this down here?

A. That is Dr. H. M. Johnson's.

Q. Who signed the examination?

A. He signed the examination.

Q. And you took the examination before him?

A. Before him.

Q. That examination was taken about the date that is given in the application?

A. At the date it was given.

Q. February 20, 1912? A. February 20, 1912.

Mr. JOHNSON.—We offer that portion of the exhibit here which is signed by Carr and Johnson.

Mr. CANNON.—It appears to be the Mutual Benefit Department of the Order of Railway Conductors of America and I object to it.

The COURT.—For what purpose was the examination made?

WITNESS.—That was for life insurance.

The COURT.—I will sustain the objection, then.

Mr. JOHNSON.—Note an exception.

Q. Had you ever been affected with tuberculosis prior to the operation you have complained of here?

Mr. CANNON.—It seems to me that is a question he can't very well tell.

The COURT.—Doctors very often disagree on

(Testimony of James E. Carr.)

that question and a layman knows nothing about it. I will sustain the objection.

Mr. JOHNSON.—Q. Now, Mr. Carr, is your mother living?

A. Yes, sir.

Q. Your grandmother living? A. Yes, sir.

Mr. CANNON.—Objected to as immaterial. Lots of people have ancient parents and still die in infancy.

The COURT.—Doctors disagree as to whether or not it is hereditary; sustain the objection.

Mr. CANNON.—And strike the answer please?

The COURT.—Yes.

Mr. JOHNSON.—Q. What was your physical condition just prior to this operation?

The COURT.—He said it was good.

Mr. JOHNSON.—Q. I show you Plaintiff's Exhibit 4 for Identification and ask you what that is?

A. That is Northern Pacific Benefit Association Constitution and By-laws.

The COURT.—Submit it to counsel on the other side and I suppose he will admit it if that is what it is.

Mr. CANNON.—I would like to know the date of it.

Mr. JOHNSON.—It is dated February 23d, 1916. I am going to offer statements from it, I am not going to offer the entire book.

Mr. CANNON.—Well, I suppose you ought to introduce it all and then call attention to those paragraphs, because those segregated paragraphs

(Testimony of James E. Carr.)

wouldn't explain the Constitution. I object to the paragraphs, but am willing the book shall go in and that he may read to the jury such portions as he may want to read.

Mr. JOHNSON.—I offer now Section 1 on Page 3; Section 1 on Page 4; Sections 7 and 8 on Page 6 and continuing with Section 8 on Page 7; Section 10 on Page 7; Section 1 on Page 9, and Subdivision B of Section 1 on Page 10.

Q. And is this a time-card furnished the conductors?

A. Furnished the employees—conductors, for the movement of trains.

Mr. JOHNSON.—We offer the part of that exhibit on Page 10 thereof under the caption "NOTE."

Mr. JOHNSON.—Q. Mr. Carr, has any physician examined you since you came to Walla Walla?

A. Yes, sir.

Q. Who examined you? A. Dr. Cropp.

Q. When did he examine you? A. Saturday.

Testimony of Dr. H. B. O'Brien, for Plaintiff.

Dr. H. B. O'BRIEN, called as a witness on behalf of the plaintiff having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JOHNSON):

Q. Dr. O'Brien, where do you live?

A. Pasco, Washington.

Q. What is your business or profession?

A. Physician and surgeon.

(Testimony of Dr. H. B. O'Brien.)

Q. From what school are you a graduate?

A. University of Minnesota.

Q. What experience have you had in surgery?

The COURT.—Any question as to the doctor's competency?

Mr. CANNON.—Well, I don't know what his experience has been, but you needn't go into it but very briefly.

Mr. Johnson.—Q. State briefly, Doctor, what your experience has been.

A. Well, I graduated from the University of Minnesota, then I spent a year at St. Joseph's, St. Paul; then I went from there out to Montana and worked for the Billings & Northern Railroad; then I was surgeon in the Stillwater State's Prison for a year, and then I went to Tacoma 1908 to 1909—

Mr. CANNON.—(Interrupting.) What I wanted to know, he is licensed to practice in this state?

Mr. JOHNSON.—Oh, yes.

Q. You went to Tacoma. What were you engaged in at Tacoma?

A. I served as interne there for about eight or nine months, nearly a year.

Q. What hospital was that at Tacoma?

A. The N. P. B. A.

Q. You are licensed to practice medicine in the State of Washington? A. I am.

Q. Were you ever employed by the Northern Pacific or the Northern Pacific Beneficial Association? A. I was.

Q. And when was that?

(Testimony of Dr. H. B. O'Brien.)

Mr. CANNON.—State which one.

Mr. JOHNSON.—Q. Which one?

A. Well both of them, I think.

Q. When were you employed by them, Doctor?

A. From about 1908, October, to about 1919.

Q. How long did you continue in the employ of the company? A. Well, about five or six years.

Q. Do you know Mr. Carr? A. I do.

Q. When did you first meet Mr. Carr?

A. Oh, about 1914.

Q. Was that after he had been operated on?

A. It was.

Q. And in what capacity did you meet him?

A. As surgeon for the company.

Q. What condition did you find him in at that time?

A. Why, I found he had a rupture of his right side on the appendical region. At times that would close and again it would open. At times he would be up and around for a week or two and then he would be down in bed for a week or two, and it has been continuing that way for the last six or seven years.

Q. Did he advise you where he had received his treatment?

A. Yes, he told me where he had been operated on.

Q. Where was that?

A. In Tacoma, at the N. P. B. A. Hospital.

Q. Have you examined him, or were you ever

(Testimony of Dr. H. B. O'Brien.)

present when Dr. Mower made an examination of him in your office?

A. Yes, he examined him up there; I think it was in 1918.

Q. Whenever that examination was, who was present?

A. Dr. Driscoll was present at the time.

Q. Dr. Driscoll, yourself and Dr. Mower?

A. Yes, sir.

Q. How did you examine him?

A. Why, Dr. Mowers put him up on the table and examined the side. Carr was having a great deal of trouble at that time and wanted to know what he would do.

Q. Did Mowers say anything regarding his condition at that time?

A. He said he thought the condition would clear up all right; an operation wasn't necessary.

Q. He told Mr. Carr an operation wasn't necessary? A. Yes, sir.

Q. Did you ever accompany Mr. Carr to the Mayo Hospital at Rochester? A. I did.

Q. Do you remember about what year that was?

A. Well, the last year I went back with him the N. P. furnished me a pass and I wasn't working for them at all.

Mr. CANNON.—I move to have that stricken out.

The COURT.—Stricken.

Mr. JOHNSON.—That is, last year; that is, 1919, you went back? A. Yes.

(Testimony of Dr. H. B. O'Brien.)

Q. At whose request did you go back with him?

Mr. CANNON.—That is immaterial, if the Court please.

The COURT.—Sustained.

Mr. JOHNSON.—Q. How many times did you go back to Rochester with Mr. Carr?

A. Oh, I have been back there twice.

Q. With him? A. Yes.

Q. And when was the date or the year of the first visit back there?

A. Well, he went back, I think the first time—he was back last year and then the year before that.

Q. That would be 1918? A. Yes.

Q. Were you then surgeon for the companies mentioned here? A. No.

Q. And you went back with Carr?

A. Yes.

Q. You had been treating him off and on?

A. Yes.

Q. In 1918 did you have any connection with the companies or did they issue any orders for you to treat any person?

A. No, I wasn't working for them then.

Q. 1918? A. Yes; up to 1918.

Q. When did you sever your connection with the company?

A. I think it was the latter part of 1919.

Q. Latter part of 1918, or 1919? A. Yes, sir.

Q. What treatment did Mr. Carr receive at Rochester in 1918 when you were back there with him?

(Testimony of Dr. H. B. O'Brien.)

A. Well, that is the time Dr. Judd went in and removed a stump of the appendix.

Q. You were present at that operation?

A. No, I was not.

Mr. CANNON.—Then I move to have it stricken out.

The COURT.—The answer will be stricken. Confine yourself, Doctor, to matters of which you have personal knowledge.

Mr. JOHNSON.—Q. Were you present at any time when Mr. Carr was treated at Rochester?

A. I was present during several dressings when Dr. Judd dressed him, and also looked at several X-ray pictures that were taken.

Q. Taken by the doctors at the Mayo Hospital?

A. Yes.

Q. From whom did you receive orders when employed by these companies for the treatment of employes who became sick or injured?

A. Usually from the Chief Surgeon.

Q. Well, if someone working on the Pasco Division become sick or injured who issued the orders?

A. Generally got them from the superintendent's office if there was a wreck or anything.

Q. Superintendent of what company?

A. Of the N. P. Railway.

Q. And in case someone became sick while in the employ of the company there who would issue the order?

A. They would send up an order for me to take care of him.

(Testimony of Dr. H. B. O'Brien.)

Q. Who would sign that order?

A. Usually the agent.

Mr. CANNON.—The order being in writing, I think the writing itself would be the best evidence.

Mr. JOHNSON.—I am not relying upon any specific order; I am showing the custom.

WITNESS.—Sometimes they would have orders and sometimes they wouldn't. If it was an emergency they would take care of them without an order.

The COURT.—If there is any written order, the order itself is the best evidence of its contents.

Mr. JOHNSON.—Q. You received those orders from the superintendent's office at times and from the agent, and did any one else have authority to issue them?

A. Usually those were the ones that would issue them.

Q. While you were physician and surgeon for the companies at Pasco who would send a man over to the Tacoma Hospital if he needed treatment?

A. Usually the company doctor.

Q. As surgeon for the company did you treat any one except employes of the company?

A. Yes, if anybody was injured in a wreck as a passenger we would take care of him.

Q. As surgeon for the N. P. and N. P. B. A. at Pasco were you required to treat patients off from other lines? A. No.

Q. The S. P. & S. runs into Pasco; did you have instructions to treat them?

(Testimony of Dr. H. B. O'Brien.)

A. Well, I have always worked for the S. P. & S. since I have been in Pasco.

Q. Calling your attention now to this state of facts: Assuming that Mr. Carr has been sent by the company to Tacoma for an operation for appendicitis; an operation was performed for appendicitis and after the operation, some three weeks afterward the wound failed to heal, and it had been bandaged with adhesive tape, and that bandage was removed and a rupture occurred, pus was discharged and dressing were applied. Doctor, how often in your opinion would it be necessary to change those dressings?

Mr. CANNON.—That is objected to as incompetent, irrelevant and immaterial; no proper basis having been furnished to base an expert opinion upon; further, that it does not yet appear that the parties treating the plaintiff were in any manner connected with the Northern Pacific Railroad, nor that the Northern Pacific Railroad was in any manner responsible for their actions, it not being claimed that these surgeons were incompetent.

The COURT.—I will overrule the objection for the present. I don't know whether there is any testimony tending to show the wound failed to heal, but he may answer.

A. It depends altogether on the amount of pus that was discharged. Of course, you dress it enough to keep it clean and dry.

Mr. JOHNSON.—Q. From your experience with

(Testimony of Dr. H. B. O'Brien.)

such cases how often would you imagine that would be necessary?

Mr. CANNON.—That is objected to upon the ground the witness himself says it depends on the amount of pus being discharged and the condition of the wound.

The COURT.—He may answer.

A. Couple of times a day.

Mr. JOHNSON.—Q. In your opinion, would it be a proper method of treatment to allow that wound to go undressed from three to five days?

Mr. CANNON.—Objected to upon the same ground, and calling for a conclusion of the witness?

The COURT.—Overruled.

A. It wouldn't be proper treatment.

Mr. JOHNSON.—Q. Now then, Doctor, if you had performed an operation for appendicitis—perforated appendix—and the wound failed to respond to ordinary treatment and kept discharging pus for months afterwards, what would be the proper treatment to pursue when that condition was found to exist?

Mr. CANNON.—That is objected to upon the ground what he would do under the circumstances isn't the criterion.

The COURT.—I will sustain the objection on the ground it is not one of the grounds of negligence charged in the complaint.

Mr. JOHNSON.—Q. Doctor, if an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treat-

(Testimony of Dr. H. B. O'Brien.)

ment and would fail to heal, what would that indicate to you as a surgeon?

Mr. CANNON.—That, if the Court please, is immaterial, what it would indicate to him.

The COURT.—He may answer. I suppose he has reference to what it would indicate as to the original operation.

Mr. JOHNSON.—Yes.

A. Well, I would eventually look for some foreign substance or something that was down there to keep it from healing.

Mr. JOHNSON.—Q. In your opinion, would the failure to remove an infected portion of the appendix cause that condition?

A. It could cause it, yes.

Q. Would it be proper surgery when you discovered that condition to exist to remove that cause?

Mr. CANNON.—That is objected to; that isn't alleged.

The COURT.—I will sustain the objection.

Mr. JOHNSON.—Q. Assuming, Doctor, that an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treatment and failed to heal, what in your opinion would be the proper method of treatment?

Mr. CANNON.—That is objected to also as outside of the issues.

(Argument.)

The COURT.—You asked him what would be the proper method of treatment assuming a part of the infected appendix was left in there, and you have

(Testimony of Dr. H. B. O'Brien.)

failed to prove any part was left in there up to this time.

Mr. JOHNSON.—Q. Assuming an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treatment and failed to heal up, kept discharging pus, what would be the proper method of treatment?

A. Why, I would go in there and operate again and try to find out the cause of the trouble and cause of the discharge.

Q. If an operation had been performed for appendicitis, the appendix were removed and a rupture occurred, what would be the proper method of treatment of that rupture?

A. If it was a clean wound I would wait a reasonable length of time and repair that rupture.

Mr. JOHNSON.—You may cross-examine.

Redirect Examination.

(By Mr. JOHNSON.)

Q. Going back again to the question of tubercular infection. If a man had been treated and allowed to remain in the condition that has been shown here by the testimony would he be apt to become tubercular from that condition?

A. He would get it infected, yes, while there was a sinus there.

Q. Now you stated in response to Mr. Cannon's question that you would wait a reasonable time before you would operate again. Would you say six or seven years was a reasonable time?

A. No, I wouldn't.

(Testimony of Dr. H. B. O'Brien.)

Q. What would you consider a reasonable time before you would make the second operation?

A. In two or three months I would decide one way or the other, I think.

Q. What would be the result of failure to properly dress a wound that was discharging pus?

Mr. CANNON.—Objected to on the ground it is not within the issues.

The COURT.—I think it is within the examination, however; he may answer.

A. The *the* pus would probably become bagged and some area would be infected.

Q. Would it be apt to cause an infection?

A. It would infect more tissue.

Q. What would be the result of that upon a man's physical condition?

A. Well, he would absorb the pus, if the dressings weren't changed, into his system.

Q. If he would absorb the pus as you have stated, how would that affect his system.

A. Well, it would be a general weakened condition; weaken him physically.

Q. Referring to Mr. Cannon's cross-examination wherein he referred to the breaking away of these sutures when the bandages were removed. If the bandages were kept in place until the proper time according to approved methods of surgery, would those sutures be apt to come away?

A. Well, they might and they might not; it is hard to tell. The bandages would strengthen them, but they might come out anyway.

(Testimony of Dr. H. B. O'Brien.)

Q. What effect would a failure to dress as you have testified about here, have upon the abdominal wall and the lower part of the abdomen?

A. Tend to weaken it.

Q. How recently have you examined Mr. Carr?

A. Why, I generally called on him every day and have for the last five or six years.

The COURT.—That doesn't answer the question.

A. He came over here Saturday; I think Saturday.

Mr. JOHNSON.—Q. You examined him Saturday? A. Yes.

Q. What is his present physical condition?

A. Well, he has got a hernia of that right side with a discharging sinus.

Q. Is this discharging sinus from the vicinity of the appendix? A. It is.

Q. Would such a discharging sinus be caused by the retention of an infection in this cavity in the vicinity of the appendix?

A. It would be caused from infected tissue there.

Q. At the present time can you say whether or not Mr. Carr is permanently disabled?

A. I believe he is, yes.

Q. In your opinion he is? A. Yes.

Question. Doctor, you stated yesterday that you went back to Rochester with Mr. Carr in 1918. Who paid your transportation?

Mr. CANNON.—That is immaterial.

The COURT.—He may answer.

A. The Northern Pacific furnished me a pass. Northern Pacific Railway Co.

(Deposition of Dr. E. S. Judd.)

At this time I would like to have the deposition of Dr. Judd so that I might read it into the record.

Deposition of Dr. E. S. Judd read, leaving out the formal parts:

Deposition of Dr. E. S. Judd, for Plaintiff.

Q. State your name, residence and profession?

A. E. S. Judd, Rochester, Minnesota. Physician and surgeon.

Q. Do you know James E. Carr of Pasco, Washington, and if so, when did you first have occasion to meet him?

A. I first met J. E. Carr, 6/3/1915, I think. I recollect him, I do not know him except as a patient.

Q. Did you ever treat Mr. Carr in your capacity as a surgeon, and if so, at what time or times and for what ailment? State fully as possible.

A. I operated upon him March 4, 1918 for a sinus in the right iliac quadrant which was discharging pus. This sinus ran down to the ileocecal coil and old stump of the appendix. Apparently there was no definite communication with the intestinal tract at any point. This area of bowel was stitched over with plain catgut. The fistulous tract ran up behind the cecum into the muscles posteriorly, into a large pocket containing heavy granulation tissue.

Q. Upon examining Mr. Carr, what condition did you find him in physically and from a surgical standpoint? State fully.

A. In addition to the discharging sinus in his right inguinal region, we made a diagnosis of tuberculosis

(Deposition of Dr. E. S. Judd.)

in both upper lobes with a cavity in the left side; tubercle bacilli were found in the sputum.

Q. From your examination and treatment of Mr. Carr, what in your opinion was the probable cause of his condition? Please state fully and completely.

A. The discharging sinus for which we operated upon him came from the region of the appendix and may have come from retained infection in that region. It also came through the deep muscles of the back and may possibly have been tubercular in origin although no positive evidence of tuberculosis could be made out in the tissue removed at that time.

Q. What is your connection with the Mayo clinic and hospitals at Rochester, Minnesota?

A. Surgeon to the Mayo clinic, surgeon to St. Mary's Hospital and the Colonial Hospital. Member of the firm of Mayo, Plummer, Judd and Balfour.

Q. Was a record kept under your supervision and observation of the entry, treatment, findings and conclusion as to Mr. Carr's case at your institution? If so, kindly produce such records in full for identification and let copies be made and attach to your examination.

A. There was a complete record kept of his entrance and treatment. He was first examined in this clinic 6/3/15. At that time a diagnosis of a sinus in the right inguinal region following an appendectomy was made. There was also a ventral hernia, and also 9/17/15, an active pulmonary tuberculosis, and tubercle bacilli were found in the

(Deposition of Dr. E. S. Judd.)

sputum. He was sent home on that account. He was next seen 2/19/18. He had been on rest cure, had gained 35 pounds. The sinus had closed a year and a half ago and remained closed for three months. Since then it has been discharging pus, but no gas or no feces. Lately he has lost a good deal of weight again, has had a little cough. States that his sputum was examined three months ago elsewhere and that they found a trace of tubercle bacilli. We found no tubercle bacilli on this examination so on March 4, 1918, I performed the operation, detailed above. After this operation the sinus did not heal promptly and he was on treatment here and at home for a long time. We next saw him 7/12/19. He returned because of the continuance of this discharge from the sinus, stating that about once in 4 to 6 weeks an abscess forms and breaks with considerable drainage; ordinarily he had some discharge all of the time. No tubercle bacilli were found. Lumbar spine, right ilium and sacro-iliac joint and lungs were negative to the X-ray at that time. In spite of this, a diagnosis of tubercular sinus was made. He was put on Carrel-Dakin treatment and Bismuth paste.

Testimony of Dr. J. F. Cropp, for Plaintiff.

Dr. J. F. CROPP, having been called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

Question. You were not present in Court yesterday?

(Testimony of Dr. J. F. Cropp.)

Answer. No.

Q. Where do you reside?

A. Walla Walla.

Q. How long have you lived in Walla Walla?

A. Forty-four years.

Mr. CANNON.—I think I shall agree that he is a duly licensed physician and surgeon and is qualified—

The COURT.—As an expert?

Mr. CANNON.—Yes.

The COURT.—Proceed then.

Q. Dr. Cropp, do you know Mr. Carr, the plaintiff in this case? A. I have met him once.

Q. When was that? A. Last Sunday I think.

Q. Did you examine Mr. Carr at that time?

A. I examined him, not exhaustively.

Q. What condition did you find him in physically?

A. Well, I found him quite exhausted, somewhat emaciated, with what I would denominate multiple hernia of the abdomen around near the location of the appendix.

Q. If it was a fact that Mr. Carr had been operated on in 1918 for appendicitis and if it was a fact that the entire appendix and infected area around the appendix had been removed, would or would not the wound respond to ordinary treatment and heal?

Mr. CANNON.—That is not a proper question for the reason that not nearly all of the facts have been stated. It is not—

The COURT.—You may answer. You can bring out the rest of them.

A. Remove all of the infected material is a propo-

(Testimony of Dr. J. F. Cropp.)

sition that is pretty hard to determine. Should there be an appendicitis and the tissue around it infected and all such infection removed I see no reason why the wound would not heal if all were removed.

Q. Assuming, Doctor, that an operation for appendicitis had been performed and adhesive tape bandage had been applied to support the abdomen and that adhesive tape and bandage had been allowed to remain for a period of three weeks and that after a period of about three weeks this bandage was removed and a rupture occurred the night the bandage was removed and excessive pus was discharged, and it was a rupture as I stated, what would be the proper improved method of treating that rupture as soon as the rupture had been discovered?

A. Every case of surgery is a law unto itself, governed by such circumstances as we find the patient at the time. Under ordinary circumstances, barring any hidden and unknown infection should this be opened and drained and the abdominal wall closed with a sufficient drainage and kept in perfect condition as possible, there ought to be relief.

Q. What would you do with the rupture, how would you treat the rupture that had occurred; there were two incisions, one long one for the purpose of reaching the appendix and the other for drainage and the large incision had ruptured, how would you treat that rupture as soon as discovered?

A. If the abdominal wound had parted?

Q. Yes.

A. There might be some condition of the ab-

(Testimony of Dr. J. F. Cropp.)

dominal wound that might not heal readily under any circumstances, but I should, as before said, I should remove as much of the offending mass as possible and drain, holding the abdominal wound as close in approximation as possible.

Q. If the stitches had given away would you do anything toward replacing those stitches?

A. If I could not hold that abdominal wall any other way would use sutures.

Q. Now, assuming the same state of facts and assuming that the wound was not stitched or sutured after it had ruptured but dressing was applied, would you consider that dressing that wound in a pus case, once in three days and once in five days would be proper surgical treatment?

Mr. CANNON.—Same objection there. The facts testified to have not been proven.

The COURT.—Stated on one occasion three days—had alleged it four or five.

Mr. CANNON.—Three days and five days were very long afterwards; five days was very long afterwards.

Mr. JOHNSON.—No, immediately afterwards.

The COURT.—Answer the question, doctor.

A. I think the general law in surgery would be to keep the wound as clean as possible; taking into consideration your patient and surrounding conditions, but whether that dressing would be once a day or twice in a day or once in three or four days depends on the condition of the wound.

Q. If it was an open wound and pus was escaping

(Testimony of Dr. J. F. Cropp.)

so that it saturated the bed clothing and escaped around the bandage, then would a dressing from first after a period of three days and then after a period of five days be a proper treatment or should dressing have been oftener in that case?

A. The case is a criterion to go by; the point I would add it would be to keep that wound clean and as free from pus as possible. I mean now the abdominal wall into which the incision had been made.

Q. After an operation for a perforated appendix had been performed, according to improved methods of surgery, would there be any stump of an appendix remaining?

A. I can't imagine a case in which the usual method of inverting had been done there would be a stump; there might be a base, we invert the stump.

Q. Explain what you mean by inverting the stump?

A. That is the appendix, we usually run what is known as a purse string suture around the base of the appendix. The base of the appendix is setting on the gut; remove the appendix, catch it with the forceps, push it in the gut, bring the wall covered by peritoneum together so as to unite over and above, the appendix being hid in the cavity of the gut.

Q. Then the stump of the appendix would be inverted in the gut and there would be no stump remaining? A. There should not be.

Q. You examined Mr. Carr you say about Sunday, and you found him emaciated; what, in your

(Testimony of Dr. J. F. Cropp.)

opinion, is the cause of his present incapacity, his present condition?

A. I did not go into this case exhaustively, I did not examine his lungs, liver, kidneys, etc. I only observed the field of the operation and I took for granted that the long discharge from this wound, barring any other germ infection gave rise to the exhaustion. Barring any hidden and unknown infection that might be absorbed into the system that might also give rise to this condition, the discharge from this field, and the history of the case, that it had been discharging for a number of years, was sufficient cause for his exhausted condition.

Q. You examined the abdominal wall, just what did you find as to the abdominal wall as it now exists there?

A. Found it was pretty well honey-combed. Areas in this immediate locality in which the fascia was absent—probably had been absorbed and allowed the intestines to protrude through these openings, produced what I would denominate as multiple hernia—numerous places through which the intestines forced its way through these holes, the fascia absorbed.

Q. What effect would the retention of pus and the failure to keep the wound clean after operation have upon this abdominal wall?

A. The presence of pus is an evidence of destruction and thereby absorption of the retaining wall.

Q. Would that be responsible for a condition such as you found the abdominal wall of Mr. Carr in?

(Testimony of Dr. J. F. Cropp.)

A. I don't know that any incision had been made outside of those—externally, and I took for granted from what I found that it was through absorption—the integrity of the wall had been acted upon by pressure and absorption. I only found the condition of multiple hernia.

Q. Could tuberculosis be contracted from allowing an open wound such as has been described here to remain open in an ordinary room in a hospital?

A. It is possible.

Q. If a cure at this time could be effected of Mr. Carr's condition, what would be required to treat that fascia of the abdominal wound there from the standpoint of surgery?

A. The first thing I would do would make an effort to find the source from which this discharge of pus and granulating material was emanating and relieve that by some counter drainage. If I succeeded in doing this, then I would, it seems to me, every case however is a law to itself, but just what I could see and know without further investigation, it would occur to me that probably transplantation of fascia upon this abdominal site would offer some hope of recovery, provided always the drainage, counter drainage was established so as not to produce the same condition that was produced prior.

Q. You mention that you would try to remove the source of infection. Assuming you had a case such as you mention and it failed to respond and continued to discharge pus after a period of twenty-one days or six months, what would be the proper

(Testimony of Dr. J. F. Cropp.)

method of treatment with regard to attempting to locate that discharge cause or making a second operation?

A. A serious proposition, might require very heroic surgery.

Q. If you had the case originally in hand how long would you wait until you went into the abdomen again and—

Mr. CANNON.—The question is not what this doctor would do, but what good surgery would—

The COURT.—I think the doctor understands the question in that light.

A. Other things being favorable, there not being sustained condition that would be unfavorable, I should aim to make this counter drainage. If the patient was in such condition that I could do more harm in producing drainage that it would sap his life, would not do it.

Q. Assuming the patient was in condition to be operated on originally when you did operate and that you had one incision that had ruptured and another incision below this for drainage and the wound refused to respond to ordinary treatment, how long would you wait, assuming of course, you used proper and improved methods of surgery, how long would you wait before you went into there and attempted to remove the source?

A. In the first place would put him in the laboratory and determine first his blood pressure, would determine the condition of his heart, I would determine the condition of his kidneys, make a

(Testimony of Dr. J. F. Cropp.)

thorough examination of the lungs and take a blood count and if I found the white and red corpuscles favorable that is, the red corpuscles was anywhere about four to six million to the square under the microscope, and found the white corpuscles not beyond six to eight thousand in the same square; his blood pressure, as I said before, favorable reaching from 130 to 140 at his age, cu. cent. 140 to 160 and the recoil or the diastole two-thirds of this, I would consider the case favorable for operation and I should at once do it.

Q. In any event would you wait six or seven years to do it?

A. Not with this report. And I would like to add to this—I would be governed a little by the appearance of the red corpuscles—have found a number of cases where there is a sufficient number of red corpuscles but the corpuscle itself was degenerated—that would cut some figure with me in operation.

(To Mr. Carr.)

Q. I will ask you, Mr. Carr, to step forward so the doctor can explain what he means as to the abdominal wall. Remove the bandages.

Mr. CANNON.—If counsel desires to have the doctor examine him he can do so immediately after this.

The COURT.—I think he can explain sufficient for the purpose.

Mr. JOHNSON.—I want the jury to see the condition of his abdomen.

(Testimony of Dr. J. F. Cropp.)

Q. Now, doctor, explain what you have to do to that abdominal wall to restore it.

A. I spoke of multiple hernia. Here is one (indicating) here is another, there is another (indicating). There is a point, that would eventually be a hernia. Several of the points in the intestines below that is bulging out between the wall of the abdomen that is separating the fascia.

Q. Explain what you mean by fascia.

A. Covers over the abdomen, fibrous structure that covers the abdomen completely and *and* if a spot or point of it is destroyed allows the intestines to come through.

The COURT.—Any claim that the plaintiff is not incapacitated?

A. No.

The COURT.—Any claim that he can be cured by ordinary means?

Mr. CANNON.—We are rather in the dark on that.

Q. Where would you get the fascia?

A. From his thigh, bring it up and transplant it would offer a hope of recovery.

Q. When you say fascia you mean the muscle?

A. No.

Q. Muscular tissue?

A. No, fibrous tissue. No muscular tissue about it. Strong fibrous structure that I had referred to as removed from the thigh and stitched there to fascia that was solid.

Testimony of James E. Carr, for Plaintiff (Recalled).

JAMES E. CARR, having been recalled as a witness in his own behalf, further testified as follows:

Direct Examination.

Q. After your operation and after the rupture to your side, that has been spoken of here, was any examination made of your heart, blood pressure, blood or lungs? A. Not that I know of.

Q. You would have known of it? A. I would.

Q. Was an examination made? A. No.

Q. How often did Dr. Mower, the doctor who operated, see you after the operation?

Mr. CANNON.—There is no allegation that the doctor did not see him often enough.

Mr. JOHNSON.—The point is whether he should have come in.

The COURT.—Answer the question.

A. The first two or three days, every day, after that once or twice a week.

Q. How often after the rupture?

A. The day after the rupture they turned me over to Dr. Argue.

Q. How often did he see you, just once?

A. He may have seen me more than once.

Q. How often did he examine the wound?

A. Once.

Q. Mr. Cannon went into an operation you had some years ago for the removal of a testicle. Do you remember about when that was?

A. Don't exactly.

(Testimony of James E. Carr.)

Q. Was it before the operation to your side the first time? A. Yes.

Q. Did you fully recover from that operation?

A. Yes.

Q. And then he asked you if you had an operation for abscess in the side, if you had a drainage, that was when? A. About 1906.

Q. Did you fully recover from that? A. Yes.

Q. How long were you in recovering?

A. About four or five weeks. Five weeks at the most.

Q. Did that ever trouble you again? A. No.

Q. Then you had a fracture or broken bone. How long were you in recovering from that?

A. Was a kid then.

Q. You fully recovered from that? A. Yes.

Testimony of John Hays, for Plaintiff.

Mr. JOHN HAYS, having been called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

Q. Where do you live? A. Pasco, Wash.

Q. What is your line of business?

A. Transfer business.

Q. Do you know Mr. Carr? A. I do.

Q. How long have you known him?

A. For about nine or ten years.

Q. Did you know him prior to the operation he had that has been mentioned here?

A. I did.

(Testimony of Mrs. Rice.)

Q. What was the condition of his health before that? A. I considered him a healthy man.

Q. About how much would he weigh?

A. I would judge probably 210 or 215 pounds.

Q. Work steady? A. He did.

Q. How far does he live from you at the present time? A. His house is 100 feet.

Q. In the same block? A. Yes.

Testimony of Mrs. Rice, for Plaintiff.

Mrs. RICE, having been called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination.

Q. Mrs. Rice, where do you live at the present time? A. Pasco, Wash.

Q. What relation are you to Mr. Carr?

A. His mother.

Q. Do you remember of an operation that Mr. Carr had in Minneapolis for abscess of the side.

A. Yes.

Q. Did he recover? A. He certainly did.

Q. Do you remember of the operation spoken of here where he had a testicle removed? A. Yes.

Q. He fully recovered? A. Yes, he did.

Q. You remember of his having a broken arm?

A. Yes.

Q. Fully recover from that? A. Yes.

Q. He had typhoid fever? A. Yes.

Q. Did he fully recover from that? A. He did.

Q. What was his physical condition prior to 1913?

A. Considered in good condition always.

Testimony of William A. Laidlow, for Defendant.

WILLIAM A. LAIDLLOW, having been called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination.

Q. State your full name?

A. William A. Laidlow.

Q. How old are you? A. Fifty-six.

Q. What is your business?

A. Secretary of the Northern Pacific Benevolent Association.

Q. How long have you been such secretary?

A. Twenty-six years.

Q. In other words, you have been connected with that Association practically since its inception?

A. No, it was in existence ten or fifteen years prior to that.

Q. What kind of an Association is this Northern Pacific Benevolent Association?

A. Voluntary Co-operative Association, taking care of the men, giving them medical and hospital care. Furnishes benefits in a great many cases.

A. These payments by the men are collected by the Railroad Company and turned over to the Association, and from that fund are paid the expenses of the hospitals, the salaries of the local surgeons, and all other expenses for care of the men.

Q. And the N. P. also gives some funds?

A. In addition to that the N. P. Ry. contributed \$25,000.00 a year. To-day they give \$50,000.00.

(Testimony of William A. Laidlow.)

Q. This organization was perfected what year?

A. 1882.

Q. And you have been with them 26 years?

A. Yes, sir.

Q. Do you know who organized the original company?

A. It was organized by the employees at that time by vote, and a board of directors selected and this constitution adopted at that time. I was not a member at that time and therefore can't testify as to that, but there has been practically very little change since then except the number of representatives has been changed.

Q. This report that you have offered here as Defendant's Exhibit "E," tells us that McKimberly was president. Who was McKimberly?

A. At that time he was Assistant to the President of the Northern Pacific Ry. Co.

Q. It gives Geo. T. Slade as First Vice-President. Who was he?

A. Second Vice-president in charge of the operation of the N. P. Ry. Co.

Q. Who was W. G. Johnston at that time?

A. He was Comptroller of the N. P. Ry. Co.

Q. What profit do the employees get out of the treatment received by passengers?

A. The claim department pay at rates for attendance at that point.

Q. Do they pay the regular rates to the surgeon on the ground?

A. No, they pay it to the Benevolent Association.

(Testimony of William A. Laidlow.)

Q. The surgeon does not get paid for taking care of those cases aside from his pay from the Benevolent Association? A. No.

Q. Is it or is it not a fact that all of the officers of the Northern Pacific Benevolent Association are officials of the Northern Pacific Railway Company?

A. At that time there were four of them.

Q. Who were they?

A. President, vice-president, comptroller and secretary-treasurer.

Q. For whom did you work prior to entering the service of the Northern Pacific Benevolent Association?

A. I was in the purchasing department of the N. P. Ry. Co.

Q. Assuming, now, that someone not an employee of the railway company, is injured in a wreck along the line, who takes care of that injured person?

A. The claim department.

Q. What doctor do they call?

A. Generally call the surgeon of the N. P. B. A.

Q. Then, where do they send him, if he needs hospital attention?

A. To the nearest hospital.

Q. Of the Northern Pacific Benevolent Association?

A. Any point where this man is injured he is generally taken care of and the claim department handles it.

Testimony of J. J. Maher, for Defendant.

J. J. MAHER, having been called as a witness on behalf of the defendant having been duly sworn, testified as follows:

Direct Examination.

Q. Your position?

A. Assistant Auditor of the Northern Pacific Railway.

Q. Do you have charge of the funds collected from the men for the Beneficial Association?

A. I did, up to March 1st of this year.

Q. Prior to that time, for a long time?

A. Yes, sir.

Q. Mr. Maher, how much of the money in operating these hospitals and paying these surgeons is used up in the treatment of accident cases outside of the employees who are contributing to this fund?

A. I can't answer that question because I don't know. I have nothing to do with the Northern Pacific Benevolent Association.

Q. What amount does the Northern Pacific Railway Co. contribute to the fund at the present time?

A. \$50,000 a year.

Q. What is that \$50,000 based on, how do they arrive at that figure?

Mr. CANNON.—If a man is injured on the road and the Benevolent Association takes care of him then the Railway Company pays the hospital for that particular service. The doctors are paid by the Railway Company.

(Testimony of A. M. Lee.)

Mr. JOHNSON.—That is an admission I am glad he made.

Testimony of A. M. Lee, for Defendant.

A. M. LEE, having been called as a witness on behalf of the defendant, and having been first duly sworn on oath, testified as follows:

Direct Examination.

Q. You are district claim agent of the Northern Pacific Railway Company? A. I am.

Q. How long have you been such agent?

A. Since twenty-five years.

Q. You have to do, have you, with persons who are injured as passengers or pedestrians, and also the trainmen? A. Yes.

Q. How are they treated?

A. By the N. P. authorized surgeons. We have surgeons for the Northern Pacific Benevolent Association, and they are also authorized surgeons for the Northern Pacific Railway Co., and in any case of a passenger being hurt the authorized surgeon is called if he is the first man that can be reached, otherwise we call any one that can be reached to render services to that person and the service is billed against the Northern Pacific Railway Company and that I direct to the surgeons. Same if they go to the hospital, the bill is paid by the Northern Pacific Railway Co. If they happen to be taken to the Northern Pacific Benevolent Association the bill is rendered by the N. P. Benevolent Association against the Railway Company and is paid by the Railway Company.

**Testimony of Dr. S. W. Mowers, for Defendant
(Recalled).**

Dr. S. W. MOWERS, having been recalled as a witness on behalf of defendant further testified as follows:

Direct Examination.

Q. When you were chief surgeon of the Northern Pacific Benevolent Association hospital at Tacoma, who hired you?

A. Northern Pacific Benevolent Association.

Q. When you say the Northern Pacific Benevolent Association hired you, what individual did you deal with in getting the employment?

A. What is known as the executive committee, Mr. A. Kimberly. Don't remember the names of the other two men on the committee.

Q. M. C. Kimberly? A. Yes, sir.

**Testimony of Dr. O'Brien, for Plaintiff (Recalled in
Rebuttal).**

Dr. O'BRIEN, having been recalled as a witness on behalf of plaintiff's rebuttal, testified as follows:

Direct Examination.

Q. Did you ever treat any strangers, not employees of the Northern Pacific Railway Company during the time you were surgeon for them?

A. Yes, a number that was injured along the line.

Q. Did you receive pay from the Northern Pacific Railway Company?

A. No, don't remember of ever receiving anything for them.

Q. The pay you received from the Northern Pacific Benevolent Association covered all your activities? A. Yes, sir.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Statement of Fact and Exception.

BE IT REMEMBERED, that the trial in the above-entitled cause, held on the 7th and 8th of June, 1920, the Honorable Frank H. Rudkin, presiding; both parties appearing by counsel; the jury having been impaneled, and the proceedings contained in the foregoing Statement of Facts duly had; that at the close of the testimony, as therein shown the defendant moved the Court for a nonsuit or an instructed verdict, which was granted, to which ruling the plaintiff then and there excepted on the ground that the evidence was sufficient to justify the Court in submitting the cause to the jury, exception was allowed, then and there entered in the minutes and subsequently preserved in the final judgment on the verdict, which was made June 21st, 1920, and entered June 22d, 1920, and the plaintiff

therefore prays that this Statement of Facts and exception be allowed and settled and signed.

CHAS. W. JOHNSON,
Attorney for Plaintiff.

The foregoing is allowed this 21 day of September, 1920, out of term.

FRANK H. RUDKIN,
Judge.

Plaintiff's Exhibit No. 4.

MEMBERSHIP.

Section 1. The membership shall include all employees of the Northern Pacific Railway Company.

MEMBERSHIP DUES.

Section 1. Members whose monthly salary is less than \$25.00.....\$.25 per month.

Members whose monthly salary or earnings is \$25.00 or over to be assessed on a basis of one (1) per cent of their monthly earnings, with a minimum deduction of 50 cents and a maximum of \$3.00 monthly.

Section 8. The Treasurer of the Northern Pacific Railway shall be elected Treasurer of the Association, and shall set apart in a special fund all assessments and contributions received from officers and employees of the Railway Company; deposit same in such bank as the Board of Managers may designate; hold, disburse and invest same under the direction of the Board of Managers.

Section 10. The Comptroller of the Northern Pa-

cific Railway shall be elected Comptroller of the Association, and will audit all accounts and report to the Board of Managers at least once a year and as often as required by the Board.

DATE OF MEMBERSHIP.

Section 1. All persons who accept service in the employ of the Northern Pacific Railway or Northern Pacific Beneficial Association shall from that date be considered as members of the Association, and entitled to its benefits, subject to the Constitution and By-Laws.

Plaintiffs' Exhibit No. 5,

NOTE.

SURGEONS will attend, when called officially, to all cases of **ACCIDENT** occurring to employees or passengers. In cases of **SICKNESS** it is the intention to limit medical service to the locality or town where a surgeon resides, unless some urgent necessity exists, for which distinct official authority must be had in accordance with established regulations.

RAILWAY OFFICIALS are required to call on the nearest authorized surgeons whenever practicable, when surgical or medical services are needed. When such are accessible, the Association will not be responsible for bills for medical services rendered by any other physician. In the event of a sudden emergency, arising from accident, if necessary

proper surgical aid should be procured until the arrival of a regularly appointed surgeon, when the case should be placed in his charge, and in no case should the services of any but an authorized company surgeon be continued at the expense of the Railway Company or of the Association after such surgeon is able to assume charge of the case.

BOARDING AND NURSING are furnished **ONLY AT OUR OWN HOSPITALS.** We are not responsible for bills incurred elsewhere unless specially authorized or approved by the Chief Surgeon, and then only in critical cases of injury or illness occurring in the discharge of duty.

Defendant's Exhibit "E."

OFFICERS

(Elected September 17th, 1913)

M. C. Kimberly	President.
Emerson Hadley	Vice-President.
W. A. Laidlaw	Secretary.
C. A. Clark	Treasurer.
H. A. Gray	Comptroller.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

AT LAW No.—

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

Assignment of Error.

Comes now, James E. Carr, plaintiff in error in
the above-entitled cause, and in connection with his
petition for writ of error in this cause, assigns as
error the following ruling of the Court and proceed-
ings had as appears in the record.

1.

The Court erred in not submitting to the jury the
question of whether or not the Northern Pacific Ben-
eficial Association was acting as the agent of the
Northern Pacific Railway Company.

2.

The question of whether or not the Northern Pa-
cific Beneficial Association was a charitable institu-
tion.

3.

The question of neglect on the part of the Northern
Pacific Railway Company, and its allied institution
and agent, the Northern Pacific Beneficial Associa-
tion.

4.

The question of the amount of damage, if any, sustained by the plaintiff in error, through such neglect.

5.

The Court erred in instructing a verdict for the defendant in error on its defense as asserted.

First.—Because the evidence introduced by the plaintiff in error would be sufficient if uncontradicted to sustain a verdict.

Second.—Because such evidence was sufficient to cause reasonable men to differ as to the conclusion to be drawn therefrom, which rulings were excepted to at the time, and exception allowed by the Court.

WHEREFORE, Plaintiff in Error prays that judgment of said court be reversed, and that he be allowed to recover damages sustained.

CHAS. W. JOHNSON,

Attorney for Plaintiff in Error.

Filed Sep. 1, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

AT LAW No.—

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Petition for Writ of Error.

TO THE HONORABLE FRANK H. RUDKIN,
Judge of the Above-entitled Court:

Comes now, James E. Carr, and by his attorney, Chas. W. Johnson, respectfully shows to the court, that on Tuesday the 8th day of June, 1920, the court directed a verdict against your petitioner, and in favor of the defendant, and ordered said cause dismissed, and your petitioner feeling himself aggrieved by said verdict and order as aforesaid, herewith petitions the court for an order permitting him to prosecute a writ of error to the Circuit Court of appeals of the United States, for the Ninth Circuit, under the laws of the United States, as in such cases made and provided.

WHEREFORE, your petitioner prays that a writ of error do issue in behalf of this plaintiff to the court aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of said error complained of, and all errors appearing in said record, and that an order be entered fixing the amount of security to be given by the plaintiff, conditioned as the law directs, and upon giving bond in such form as may be required, his proceedings be suspended herein until the determination of said Writ of Error by the court aforesaid.

CHAS. W. JOHNSON,
Attorney for Plaintiff in Error.

Filed Sep. 1, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

AT LAW No.——

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Order Granting Writ of Error.

The above-entitled matter having been presented to the court upon plaintiff's petition for writ of error, assignment of errors, and the record and files in said cause, and the court being fully advised in the premises.

IT IS THEREFORE ORDERED, That the said writ of error be, and the same is hereby granted, and the amount of bond required as security to be given by the plaintiff in error, be, and is hereby fixed in the sum of \$200.00.

Dated this 21st day of June, 1920.

FRANK H. RUDKIN,

Judge of Said Court.

Filed Sep. 1, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the district Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, James E. Carr as principal, and the Fidelity
and Deposit Company of Maryland, as surety, are
held and firmly bound unto the Northern Pacific
Railway Company, defendant in error, in the full and
just sum of \$200.00, to be paid to the said Railway
Company, its attorneys, successors or assigns, to
which payment well and truly to be made, we bind
ourselves, our successors or assigns, jointly and
severally by these presents.

Signed and dated this 25th day of August, 1920.

WHEREAS, lately at the regular term of the
District Court of the United States, for the Eastern
District of Washington, sitting at Walla Walla in
said District, in a suit pending and entitled as above
on the law docket of the said court, final judgment
was rendered against the plaintiff in error, dismissing
the plaintiff's cause with costs, and the said plain-
tiff has obtained a writ of error, and filed a copy
thereof in the Clerk's office in the said court, to re-

verse the judgment of the said court in the above suit, and a citation directed to the said Northern Pacific Railway Company, the defendant in error citing it to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said James E. Carr shall prosecute said writ, to effect and answer all damages and costs, if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JAMES E. CARR,

Plaintiff in Error,

By: CHAS. W. JOHNSON,

His Attorney.

FIDELITY and DEPOSIT CO. of MARYLAND,

By CHAS. W. JOHNSON,

Attorney-in-Fact.

[Surety Company Seal].

Approved this 10 day of September, 1920.

FRANK H. RUDKIN,

Judge.

Filed Sept. 18, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the United States Circuit Court of Appeals for
for the Ninth Circuit.

At Law No.—

JAMES E. CARR, .

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,
To the Honorable Frank H. Rudkin, Judge of the
District Court of the United States for the Eastern
District of Washington, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment which is in said Dis-
trict Court, before you, between James E. Carr,
Plaintiff in Error, and the Northern Pacific Railway
Company, a corporation, Defendant in Error, a man-
ifest error hath happened to James E. Carr, plain-
tiff in error, as by said complaint appears, and we
being willing that error, if any hath been, should be
corrected, and full and speedy justice done to the
party aforesaid in this behalf, do command you, if
judgment be therein given, that then under your seal,
you send the record and proceedings aforesaid, with
all things concerning the same, to the United States
Circuit Court of Appeals for the Ninth Circuit, to-
gether with this writ, so that you have the same at

San Francisco, in the State of California, where said court is sitting, within thirty days from date hereof, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, according to the laws of the United States, as should be done.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Citation on Writ of Error.

To the Northern Pacific Railway Company, and to
Edward J. Cannon, your attorney, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the above-entitled court, wherein James E. Carr is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the directed verdict and judgment rendered against the said plaintiff in error, as in said writ of

error mentioned should not be corrected, and why speedy justice should not be done the party in that behalf.

WITNESS, the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, this 18 day of Sept, 1920.

FRANK H. RUDKIN,
Judge.

Filed Sep. 25, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

Copy received of the within Citation this 30th day of September, 1920.

E. J. CANNON,
Attorney for Defendants.

In the United States Circuit Court of Appeals for
for the Ninth Circuit.

At Law No. 3587.

JAMES E. CARR,
Plaintiff in Error,
vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant in Error.

Clerk's Instructions for Printing Record.

To the Clerk of the Above-entitled court:

You will please take notice that the plaintiff in error relies upon the error committed by the trial

court in refusing to submit the issues raised by the evidence to the jury, and that in accordance with Section 8 of Rule 23, the plaintiff in error believes that it will be necessary for that portion of the record hereinafter specified, and that such portions of the record only be printed.

1. The complaint as appears on pages 1 to 3 inclusive of the Clerk's transcript.

2. The answer as appears at pages 11 and 12 of the Clerk's transcript.

3. That portion of the reply appearing on the first half of page 14, eliminating the verification.

4. The Court's instructions for verdict, the ruling and exception as contained on page. 111 of the bill of exceptions.

5. The verdict as contained on page 15 of the Clerk's transcript.

6. Judgment appearing at page 16 of the clerk's transcript.

The plaintiff in error deems a portion of the bill of exceptions necessary to the consideration of the Court's ruling, and you will therefore print the following portion of said bill of exceptions:

Page 2, from lines 1 to 16, and from 27 to 30 inclusive.

Page 3, Lines 9 to 13; 18 to 26, and all of Defendant's Exhibit "A" attached thereto and referred to in Line 26; except paragraph 17, and Lines 30 to 32 inclusive, page 3.

Line 1 and Lines 18 to 32 inclusive, page 4.

Lines 1 to 4 and 21 to 32, page 5.

All of page 6 to 23 inclusive.

Lines 1 to 17 inclusive, page 24.

Lines 5 to 9 and 27 to 32, page 25.

Line 1, page 26.

Pages 34 to 41 inclusive.

Lines 1 to 5, page 42.

Lines 17 to 32, page 52.

All of page 53; lines 1 to 16, page 54.

Lines 8 to 17, page 56.

Pages 59 and 60.

Lines 1 to 16, page 61.

Pages 62 to 70, inclusive, and line 1, page 71.

Page 80 and Lines 1 to 4, page 81.

Lines 9 to 30, page 84.

Lines 9 to 29, page 86.

Lines 17 to 32, page 87, and Lines 1 to 17, page 88.

Lines 1 to 18, page 91.

Lines 18 to 22, and 27 to 30, page 92.

Lines 7 to 9, page 93.

Lines 11 to 32, page 95.

Lines 15 to 23, page 96.

Lines 1 to 22, page 97.

Lines 1 to 14, page 98.

Lines 3 to 14, page 99.

Lines 8 to 18, page 101.

Lines 1 to 15; 25 to 32, page 102; and 1 to 8, page 103.

Lines 7 to 15, and 26 to 30, page 107.

Lines 1 and 2, page 108.

Lines 16 to 32, page 109.

Lines 1 to 3, page 110.

All of page 112.

Also the following portions of plaintiff's Exhibit 4:

The first 2 lines of Article 2, page 3; the first section of Article 3, page 4; Sections 8 and 10, Article 6, pages 6 and 7; Sec. 1, Article 1, of By Laws, page 9.

That portion of plaintiff's "Exhibit 5" found at page 10, under the heading "note" referring to surgeons, railway officials, boarding and nursing, being the upper half of said page 10, eliminating therefrom the list of surgeons.

The list of officers under the heading entitled "officers" on the first page of defendant's Exhibit "E."

You will further print the following proceedings had on appeal:

Assignments of error 17 and 18, clerk's transcript.

Petition for writ, page 19, clerk's transcript.

Order granting writ, page 20, clerk's transcript.

Bond, pages 21 and 22, clerk's transcript.

Writ of error, pages 22 and 23, clerk's transcript.

Citation in error, page 25, clerk's transcript.

Or so much of such appellate proceedings as may be deemed necessary or proper under your custom, and all other portions of the certified record will be omitted.

CHAS. W. JOHNSON,
Atty. for Plaintiff in Error.

Copy received of the within instructions for printing record is hereby admitted this 5th day of Oct. 1920. E. J. Cannon and F. J. McKevitt, attorneys for defendant in error.

[Endorsed]: No. 3587, United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1920. F. D. Monckton, Clerk.

[Endorsed]: No. 3587. United States Circuit Court of Appeals for the Ninth Circuit. James E. Carr, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filed October 13, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.